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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF OREGON,

Petitioner,

v.

BRUCE ALAN KENNEDY,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals
Of the State of Oregon

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment protects the defendant from retrial when the prosecutor intentionally asked a highly prejudicial question that provoked a mistrial?

TABLE OF CONTENTS

Brief of Respondent

Page

QUESTIONS PRESENTED..... i

STATEMENT OF THE CASE 1

ARGUMENT..... 2

A. OREGON COURT OF APPEALS STANDARD OF PROSECUTORIAL CONDUCT..... 2

B. NO CONFLICT AS TO LAW AND FACTS..13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases Cited Page

Arizona v. Washington,
434 U.S. 507, 508..... 2

Divans v. Calif., 434 U.S. 1303,
54 L.Ed.2d 14, 98 S.Ct. 1..... 10

Giglio v. United States,
405 U.S. 150, 92 S.Ct. 763,
31 L.Ed.2d 104 (1972)..... 9

Green v. United States, 355 U.S. 184,
187-188, 78 S.Ct. 221,
2 L.Ed.2d 199 (1957)..... 4

State v. Embry, 19 OR App. 934, 940,
(1974) 10,11

State v. Jackson, 33 OR App. 139,
(1978)..... 11

Tabbs v. State, 403 A.2d 796,
(Maryland 1979)..... 13

United States v. Dinitz,
424 U.S. 600, 96 S. Ct. 1075,
47 L.Ed.2d 267 (1976)..... 2,12,13

United States v. Jorn, 400 U.S. 470,
91 S.Ct. 547, 27 L.Ed.2d 543..... 5,7,9,
10,14

United States v. Kessler,
530 F.2d 1246, 1253-54 (1976)..... 8,10

United States v. Perez,
22 U.S. (9 Wheat) 579, 580 (1824)... 4,5

(Continued)

TABLE OF AUTHORITIES

(Continued) Cases Page

United States v. Tateo,
377 U.S. 463, 468 (1964)
84 S.Ct. 1587, 12 L.Ed.2d 448..... 5

Constitutional Provisions

U.S. Constitution, Amend. V..... 10

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STATEMENT OF CASE

Respondent accepts the Petitioner's statement of the case as pointing up the double jeopardy issue of prosecutorial conduct.

ARGUMENT

A. OREGON COURT OF APPEALS STANDARD OF PROSECUTORIAL CONDUCT.

The Oregon court has properly applied the rule enunciated in United States v. Dinitz, 424 U.S. 600, 611:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' . . .threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."

The court applied the above standard and this rule was reaffirmed in Arizona v. Washington, 434 U.S. 507, 508, where the court stated:

> "Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resource of the State to harass or to achieve a tactical advantage over the accused."

If the rule isn't applied with the "strictest scrutiny" then we must apply a subjective standard of the prosecutor and that would lead the court and the bar into an impossible maze of confusion.

The Petitioner, in its Statement of Facts,page 4, stated that the prosecutor vigorously objected to the mistrial. This is a serious example of the lack of sensitivity of the prosecutor to defendant's having a fair trial and the lack of appreciation of the gravity of the situation.

The defendant is protected by the fundamental constitutional guarantee that he cannot twice be placed in jeopardy for the same offense.

This guarantee does not apply when there is a breakdown of the judicial machinery or where the defendant moves for a mistrial through no intentional misconduct of the prosecutor.

The unwarranted and intentional remarks of the prosecutor tainted the entire proceedings and cannot be tolerated.

The fundamental is well spoken in Green v. United States, 355 U.S 184, 187-188 (1957) where the Court emphasized the underlying proposition "is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The defendant then has a valued right to go before a particular tribunal and take his chances (Perez Doctrine) United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824).

The question then reduces itself to the proposition, "if the prosecutor intentionally and under gross circumstances

taints the whole proceeding and the defendant is forced to move a mistrial, except him from the constitutional guarantee?" We think not.

See United States v. Tateo, 377 U.S. 463, 468 (1964) - where defendant's mistrial motion necessitated by prosecutorial impropriety designed to avoid an acquittal, re-prosecution might well be barred.

In United States v. Jorn, 400 U.S. 470, p. 488, in the dissent of Justices Stewart, White and Blockmann,they analyze some of the ground rules in United States v. Tateo, supra, United States v. Perez, supra, and others, and on p. 492, "The real question is whether there has been 'an abuse' of the trial process resulting in prejudice to the accused by way of harassment or the like, such as to outweigh society's interest in the punishment of a crime."

The cases cited within that dissent often lump judicial and prosecutorial error

in the same sentence. Judicial abuse of discretion in aborting the trial is an obvious basis for double jeopardy but equally as disasterous and prejudicial to defendant is the intentional prosecutorial error that was invited by the harmful and unnecessary loaded question that is involved in this case. This absolutely prevented defendant from carrying on with the first jury. Why the prosecutor chose these words may be subjective, but the obvious result is very objective. Was it a jury the prosecutor didn't like? Was the State's witness unconvincing? Were there other factors not known to anyone but the prosecutor why it was unfavorable to carry on with this trial?

If gross error can be no bar, then the rule has little significance to the defendant.

There is a wide gap between an inadvertence that the prosecutor couldn't prevent and no bar would result for a retrial.

The objectionable words here were not uttered by a witness, but were the intentional and spoken words of the prosecutor.

While each case has to be decided in the particular facts, there appears to be two time-tried fundamentals:

(1) Double Jeopardy Clause is to protect the defendant from continued exposure to embarrassment, anxiety, expense and restrictions on his liberty and his valued right to have his trial completed by a particular jury. United States v. Jorn, supra, 484.

(2) Society's interest that a criminal defendant be punished for his infractions.

Defendant-respondent plainly falls into the first category. He had continued exposure to:

(a) Embarrassment

(b) Anxiety

(c) Expense

(d) Restrictions on his liberty

(e) His valued right to conclude the first trial. Who deprived him his rights? The prosecutor.

Does this objective outweigh the public interest? See United States v. Kessler, 530 F2d 1246 (1976) p. 1253-54. "The underlying idea,one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

The court goes on to say that ordinarily a defendant's request for a mistrial removes any constitutional barrier to retrial, continuing on p. 1255, "But the Supreme Court recognizes that there may be exceptions to that rule - rare cases involving circumstances which are 'attributable to prosecutorial overreaching'" (Citing Jorn, supra, 400 U.S. 485). Where "prosecutorial overreaching" exists, a defendant's mistrial request does not improve the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.

Where "prosecutorial overreaching" is present, the interest protected by the Double Jeopardy Clause, outweighs the public's interest in conducting a second trial ending in acquittal or conviction. Giglio v. U.S., 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed 2d 104 (1972).

This safeguard against "prosecutorial overreaching" provided defendant by the Fifth Amendment Double Jeopardy Clause, complements the "inestimable safeguard against the .....overzealous prosecutor," provided by a jury trial.

The court in the above cited Kessler case held that it was intentional misconduct in introducing certain hearsay evidence regarding a rifle and conspiracy and that such conduct was a bar to retrial regardless of defendant's motion for mistrial. See Divans v. Calif., 434 U.S. 1303, 54 L. Ed.2d 14, 98 S. Ct. 1.

The purpose of the Double Jeopardy Clause is to discourage the abusive and awesome power of the state.

Defendant has a valued right to a fair trial and to proceed with the original tribunal, United States v. Jorn, supra, and State v. Embry, 19 Or. App. 934, 940 (1974).

To have a fair trial requires fairness on the part of the court, prosecutor and defense counsel. Each must uphold that responsibility. The granting of a mistrial is a drastic remedy to be avoided, State v. Embry, supra p. 941. If the defense counsel is unfair and it results in a "manifest necessity" to abort the proceedings, defendant cannot object, but if the prosecutor is guilty of such conduct, he has seriously interfered with defendant's "valued right" and the constitutional barrier applies. If it were otherwise, the state could get away with abusive tactics and the only penalty would be a retrial. Such practice does not serve the Bill of Rights.

Oregon recognizes the distinction between the prosecution's intentional misconduct and overreaching. In State v. Jackson, 33 Or. App. 139, the court stated: "From our examination of the circumstances

leading up to mistrial, we can find no basis for characterizing the prosecution's conduct as intentional misconduct, bad faith or overreaching, or for ordering dismissal with prejudice." Cf. United States v. Dinitz, 424 U.S. 600. In the above cited case, the prosecutor attempted to avoid the problem. In our case, the words were intentionally framed on the prosecutor's lips and the following colloquy by prosecutor and witness occurred:

Q. "Have you ever done business with the Kennedys?"

A. "No, I have not."

Q. (By prosecutor) "Is that because he is a crook?" Tr. (J. Roth p. 67). The court believed it was prejudicial. Tr. (J. Roth). There was no inadvertence; no overzealous witness, but the plain intentionally and obviously abusive and highly prejudicial statement uttered by the prosecutor.

Petitioner cites Tabbs v. State, 403 A.2d 796 (Md. 1979). The facts of that case are clearly distinguishable from the damaging utterance in this case. The Tabbs case involved a damaging blurting out by a state's witness. No intent on the part of the prosecutor -- perhaps negligence in not advising the witness against such behavior. Here, the remark was intentional and clearly not in the area of negligence.

B. NO CONFLICT AS TO LAW AND FACTS.

Petitioner suggests that there is a conflict among the various jurisdictions. The Dinitz, supra, rule is not in conflict.

If petitioner's argument were successful, then the test would be a subjective test of the prosecutor's intentions. This would lead to confusion.

The petitioner cites no case where the prosecutor's conduct is similar to the present

facts. An examination of the cases points more to the area of gross negligence or conduct that does not measure up to the severity of the utterance here that placed the defendant in an impossible situation.

The rule is well established in U.S. v. Jorn, 400 U.S. 470, at 485, where "prosecutorial overreaching" exists, a defendant's request for mistrial does not remove the constitutional protection of double jeopardy.

To make the test subjective where objective conduct is present would seriously damage the constitutional protection of double jeopardy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Oregon Court of Appeals was clearly

correct and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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